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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

ROGER DURAND, LINDA DURAND,)
and PRISCILLA DURAND,)
Plaintiffs,) Court File No.
v.) 15-CV-02102 (RHK-SER)
FAIRVIEW HEALTH SERVICES,)
Defendant.)

Videoconference Deposition of
JUDY A. SHEPARD-KEGL, Ph.D., taken pursuant to
notice before Cindy Packard, RDR, a Notary Public in
and for the State of Maine, at the law offices of
Norman, Hanson & DeTroy, Two Canal Plaza, Portland,
Maine, on August 11, 2016, commencing at 10:16 a.m.

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Deponent: JUDY A. SHEPARD-KEGL, Ph.D.

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A P P E A R A N C E S

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STIPULATION

It is hereby agreed by and between the
parties that signature is not waived.

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JUDY A. SHEPARD-KEGL, having been duly sworn by
the Notary Public, was examined and testified as
follows:

EXAMINATION BY MR. FRANTZEN:

Q. Good morning. Could you please state your
name for the record?

A. Judy Shepard-Kegl, S-H-E-P-A-R-D - K-E-G-L.

Q. Good morning, Dr. Shepard-Kegl. We had a
chance to chat briefly before the start of
the deposition. As you know, my name is Matt
Frantzen, and I represent the defendant in
this case, Fairview Health Services.

Do you understand that?

A. I do.

Q. And we're conducting this deposition today by
videoconference. You're in Portland, Maine;
is that right?

A. I am.

Q. Miss Gilbert and I are in Minneapolis. We're
doing this by videoconference. Can you see
and hear me okay?

1 now I want you to tell me the story speaking
2 in English.

3 So I'm getting an ASL sample, a writing
4 sample and a speech sample with the same
5 narrative to look at what her skills are in
6 those areas. And I'll come back to that
7 later on.

8 Then I do a thing called -- it's -- the
9 task is also called the topological,
10 T-O-P-O-L-O-G-I-C-A-L, relations task. Right
11 here it's called "Verbs of Location" or
12 Bowerman Task, which is its more informal
13 label. Bowerman, B-O-W-E-R-M-A-N.

14 That's a set of pictures, and the
15 pictures are -- give you relations between
16 some object and some other entity.

17 So, for example, the first example is a
18 cup on a table. Second example is an apple
19 in a bowl. And the reason I go through this
20 series is, there's a grammatical difference
21 between American Sign Language and English.
22 American Sign Language tends to always put
23 the ground first and the figure second.

24 So I have a bottle that's on the table
25 in front of me. The more stable, larger

1 you will see the discussion of what the
2 background conversation is and what it's
3 about.

4 So background conversation includes
5 their responses to all my questions under the
6 cultural profile, any digressions in
7 conversation, my questions about what
8 happened to them in the hospital. It's the
9 background conversation that goes on
10 throughout the entirety of the testing.

11 And I will shift in that background
12 conversation between signing kind of ASL to
13 them. I'll shift to a little bit more
14 English kind of signing. And just -- I'm
15 looking to see, are there places where they
16 understand worse or they understand better in
17 those -- in that regard.

18 Q. Thank you. Page 60, Doctor, heading
19 III.3.b., says: Cognitive Academic Language
20 Proficiency. And you have an acronym, CALP?

21 A. CALP.

22 Q. C-A-L-P?

23 A. Yes.

24 Q. Can you just tell me what CALP is and what
25 that tells us about a person's language

1 thing is the ground. That's the table. And
2 the thing that gets placed is the figure.

3 Or if a person's walking down the
4 street, the street is the ground, and the
5 person walking down the street is the figure.

6 In American Sign Language grammar, the
7 ground is expressed prior to the figure. In
8 English, it's exactly the opposite. The
9 figure is expressed before the ground.

10 So you would say, The bottle is on the
11 table. But a deaf signer would say the
12 equivalent of table, bottle on. So you get
13 ground and then figure. So these are to see
14 what word order she tends to use when she
15 produces signing relative to these pictures.

16 Okay. You want me to do results, too,
17 of her? Because her results --

18 Q. Why don't we do this. Why don't we go to the
19 next one, "Background Conversation." And
20 just tell me what that means, that paragraph,
21 that phrase, background conversation?

22 A. That's what this whole rest of the test is
23 about. So if you went to -- I'm just telling
24 you, in case I don't say enough here, but if
25 you go to III.1.b. in everything up to 59,

1 proficiency and comprehension?

2 A. Can I start with BICS and go to CALP?
3 Because it puts it in perspective.

4 Q. Absolutely.

5 A. So when you talk about language proficiency,
6 you can look at someone who looks like
7 they're a fluent speaker of English or a
8 fluent signer. And they can actually not
9 have CALP.

10 So BICS is Basic Interpersonal
11 Communication Skills. Can you go to a
12 restaurant, can you go to a bar, sit down
13 across the table from someone and schmooze?
14 Can you talk to someone about, you know, sort
15 of everyday shared things in life? Things
16 that you know.

17 And there are many deaf people, many
18 hearing people who sign, who have BICS, who
19 can kind of talk about the here and now, the
20 everyday, the average conversational kinds of
21 stuff.

22 But they don't all have CALP. BICS is
23 something you learn in interaction with
24 others, you learn in the language.

25 Studies that have been done on

1 immigrants, for example, who come to the
2 country, within two or three years, they're
3 showing BICS in English, but they're not yet
4 showing CALP.

5 It takes time for that CALP to develop,
6 and it doesn't just develop with your
7 interactions with other people. It
8 develops -- you learn it. It's part of the
9 academic experience of using a language to
10 access information, particularly new
11 information.

12 So when I'm looking at someone's skills,
13 I'm looking for fluency, yes. But I'm also
14 looking at whether they can take information
15 that's coming in and read between the lines.
16 Whether they can do -- sort of analyze,
17 synthesize, do the kinds of things with
18 language that you need to do to work with
19 language in a school environment or learning
20 environment, or an environment like a
21 hospital where you've got to learn about
22 medical situations. That requires the use of
23 CALP.

24 And what I found -- if you want results,
25 what I found with her is, yes, she has CALP.

1 Q. Go ahead.

2 A. I looked at her CALP in specific ways, but
3 one way was presenting a narrative called
4 "Mr. Koumal Flies like a Bird," signed by a
5 native signer.

6 And it's a story that's allegorical.
7 It's about these three -- four birds that are
8 born to two bird parents, three of them have
9 bent beaks. They're eagles, and one has a
10 straight beak. And the straight-beak bird,
11 they call the doctor, they bring him in.
12 They take him to a church. They take him to
13 an ear, nose and throat specialist to see
14 what's wrong and why his beak is straight.

15 They consider surgery. It's too
16 expensive. They consider sending him to a
17 special school where they work to get his
18 beak to behave like an eagle's beak, and have
19 him value the things eagles value, et cetera,
20 et cetera.

21 The story is an allegory based on a deaf
22 child who is born in a family with hearing
23 parents and is different, and how the parents
24 try to fix them or try to rectify -- to make
25 them quote, unquote, normal or more like

1 Q. Let me step back. Actually, under BICS, you
2 found that: Miss Durand has mastery of
3 BICS --

4 A. Yes.

5 Q. -- in ASL. In casual conversation, she is
6 fluent and comprehends easily. Correct?

7 A. Yes, she does.

8 Q. Then under CALP, you say: When language
9 becomes more academic in nature or involves
10 explanation of new unfamiliar information or
11 tasks, Miss Durand is also competent to
12 follow the communication and assess it using
13 critical thinking. Correct?

14 A. Correct.

15 Q. And when we use the phrase "critical
16 thinking," what does that mean to you? What
17 do you mean by the use of the phrase critical
18 thinking?

19 A. What's -- why are people saying this? What's
20 the meaning behind the meaning? You know,
21 thinking about what's being told to you
22 rather than just taking it at face value.

23 Now, I looked at --

24 Q. You --

25 A. Yes?

1 hearing.

2 Some people -- like you might have read
3 "Gulliver's Travels." Right? Some people
4 read "Gulliver's Travels," and it's this cool
5 little story about this guy who in one
6 context is a giant, and in another context is
7 this little person. But the reality is when
8 Melville [sic] wrote "Gulliver's Travels," it
9 was a satire on sort of politics of the day.
10 Political satire.

11 Could the person get anything beyond the
12 story of "Gulliver's Travels" and realize
13 it's political satire or not? Could the
14 person watching this story about these birds
15 think about the parallels to deaf culture and
16 what's going on in the deaf culture?

17 That's what I was looking at with "Bird
18 of a Different Feather." If a person has
19 some CALP, they can bring the argumentation
20 that these stories are parallel and recognize
21 these connections. If they don't have CALP,
22 they tend to take it as just a basic story,
23 fairy tale.

24 Q. And you found that Miss Durand had CALP?

25 A. Correct. And in that regard, I would be in

1 conflict with Anna Witter-Merithew, who seems
2 on her reading of my report some -- and the
3 depositions, somehow doesn't think she has
4 CALP.

5 I think a woman who has done all the
6 education that she's done and behaved the way
7 she did with my stuff clearly has the ability
8 to process language in an academic
9 environment.

10 Q. And you state -- the last sentence there
11 under that CALP paragraph that: She --
12 referring to Linda Durand -- is capable of
13 expressing and comprehending complex
14 information. She can use her language to
15 engage in analysis, synthesis and evaluation.

16 Correct?

17 A. Correct.

18 Q. And then next -- the next paragraph under
19 there: Summary of ASL language proficiency.

20 You note in about the last sentence or
21 two: She is proficient -- Linda Durand is:
22 Proficient in using a PSE variant of ASL
23 through which she can access any necessary
24 information regarding medical issues.

25 My first question is -- I know it's

1 And second, she's been using ASL a lot
2 more since she moved into working in deaf
3 services, working in group homes and things
4 like that. So she's -- she's got good
5 reception of ASL, excellent reception of ASL,
6 but her signing tends to lean toward this
7 Pidgin Sign English form.

8 Q. And because of her abilities, both in this
9 Pidgin Sign English and the American Sign
10 Language, your last sentence of that
11 paragraph says: There are even more
12 interpreters proficient in using this contact
13 signing form. So with an interpreter
14 provided, Miss Durand would have had full
15 access to communication in the hospital
16 context. Correct?

17 A. Correct.

18 Q. Now, does that mean to you that if Fairview
19 had provided qualified interpreters for the
20 benefit of Linda Durand in May, 2013, that
21 she would have had the ability to understand
22 any medical information being conveyed to her
23 regarding her son?

24 MS. GILBERT: Objection. Form.

25 THE DEPONENT: Yeah, I mean, you're kind

1 defined in your report, but I want you to
2 tell me -- what is PSE as opposed to ASL?

3 A. Okay. So PSE, the spell-out of PSE is a term
4 called Pidgin Sign English. It's now
5 typically called contact signing. But what
6 it means is, some people will sign ASL with
7 strong use of ASL grammar, facial expression,
8 3-D use of space, the full grammar of ASL.

9 There are other people who will pick
10 their signs typically as conceptually
11 accurate ASL signs, but they'll favor. Where
12 ASL would allow a certain order, order that
13 would be more like English, they'll favor
14 that order, and sometimes even favor the
15 English order of elements in the way that
16 they sign.

17 Miss Durand -- and it fits with her
18 growing up in very hearing environments and
19 her experiences and her not -- you know,
20 knowledge of English, Miss Durand tends to
21 use signing that is -- leans much more
22 towards the English range of the spectrum of
23 word order and grammatical decisions than
24 ASL, except in the context of signing with
25 her husband.

1 of moving away from the heart of it. What
2 she could do is, she could certainly work
3 with a wider range of interpreters than
4 someone who very strongly fell into just the
5 use of ASL.

6 There are some people where you shift
7 into this PSE mode, and they -- their
8 understanding starts to tank because they're
9 missing lots of grammar. She's somebody who
10 can kind of rely on her English to get a
11 wider range of signing input.

12 So interpreters who were
13 transliterators, more coding English, and
14 interpreters who were using ASL, that whole
15 range of people would be accessible to her.
16 I'm not saying she's going to understand
17 every -- everything that's said to her first
18 shot, first on, that's it.

19 A Pidgin, by definition, requires a
20 person to kind of do this dance to figure out
21 how to match up with that individual.

22 So when I have -- as an interpreter,
23 when I have someone who is more in that
24 Pidgin Sign English range, I'm figuring out
25 how much ASL can I put in there, how much can

1 He's not the club goer that Linda is, but he
2 goes to deaf events. Married to a deaf
3 spouse.

4 His, you know -- his occupation --
5 interesting schooling. He has a lot of
6 schooling. He actually went to Gallaudet.
7 He got an MA in psychology and social work,
8 but his actual working has been pretty
9 typical deaf occupations.

10 He's worked in -- you know, hard labor
11 jobs. He was a dorm supervisor at North
12 Dakota School for the Deaf, worked as a
13 loader for UPS. So pretty typical deaf-type
14 jobs, even though he advanced pretty far in
15 his education.

16 He reports his hearing loss as severe,
17 although Priscilla says that her perception
18 is that he's lost -- he doesn't think it's
19 changed from when he was little. Her
20 perception is that he's lost some hearing
21 over the years. And he'd be somebody I would
22 recommend maybe testing again.

23 So his early --

24 Q. Was he wearing hearing aids during your
25 evaluation?

1 requesting interpreters regularly, important
2 interchanges. He doesn't use them all the
3 time. He's very aware of the signing
4 limitations of his children and prefers not
5 to have them try to sign for him.

6 So I expect second-language learner
7 proficiency in ASL for him, exposure from the
8 age of 12 in residential schools for the
9 deaf. And for the most part, that's what I
10 see in terms of his ASL skills. His ASL is
11 pretty good.

12 He tends to lean towards the English
13 type of ASL. I would say that Linda Durand
14 understands some of the more ASL
15 grammar-ish-type things than -- a little
16 better than Roger does. But he's got more of
17 the deaf culture exposure than she has.

18 Q. If you could turn to page 80, Doctor, of your
19 report.

20 A. Uh-huh.

21 Q. Under "Background Conversation," we had
22 talked about that with Linda Durand. But
23 under background conversation, based upon
24 your communication with Roger Durand, you
25 concluded that he: Understood background

1 A. He wears hearing aids.

2 Q. Is it your understanding that he wears them
3 all day every day?

4 A. I didn't ask that, but he does tend to use
5 them to supplement speech, and he uses his
6 hearing a lot. So I assume he wears them
7 pretty regularly.

8 Q. Okay. Go ahead.

9 A. So in terms of sort of early life choices,
10 really early life choices, hearing emphasis,
11 you know, more hearing culture oriented. But
12 by middle school, he was put in a school for
13 the deaf so he got that early exposure.
14 Later life choices show an affinity with deaf
15 culture, in some ways more so than Linda
16 Durand.

17 He has a lot more knowledge. When we
18 did the study -- when we did the looking at
19 CALP and ASL, and he watched the "Bird of a
20 Different Feather," he was much quicker to
21 pick up on the deaf-related jokes and things
22 that were inside of there than Linda was.
23 Linda got the parallels, but he was able to
24 get a more fine-grained sense of it.

25 So, you know, he -- again, he reports

1 conversation with ease, even when topics
2 moved into new or complex information.

3 Correct?

4 A. Yes.

5 Q. And my question for you is: What new or
6 complex information were you discussing with
7 Mr. Durand?

8 A. I mean, I discussed everything from their
9 medical situation to, you know, the stories
10 that we provided, to his work. Everything we
11 talked about, he seemed to understand the
12 range of things that I was using.

13 Q. Okay. And if we go down, we talked about
14 BICS and CALP also with respect to Linda
15 Durand. You did the same here.

16 You say on page 80, under the "BICS v.
17 CALP," that: As might be expected since he
18 earned both a degree at Gallaudet and a
19 subsequent master's degree, Mr. Durand
20 demonstrates CALP in both English and ASL.

21 Correct?

22 A. Yeah.

23 Q. And "In background conversation and in his
24 analysis of 'Bird of a Different Feather,'"
25 you say he: Demonstrated skills in

1 evaluation, analysis and synthesis.
 2 Correct?
 3 A. Correct.
 4 Q. And then down at the bottom, BICS, again, you
 5 concluded he: Has mastery of BICS in ASL.
 6 And that: In casual conversation, he is
 7 fluent and comprehends easily. Correct?
 8 A. Correct.
 9 Q. And that casual conversation and him being
 10 fluent, is that signing or was that
 11 lipreading or both?
 12 A. Signing.
 13 Q. Okay.
 14 A. The one place in his ASL proficiency where I
 15 saw a dip, he understood the "Bird of a
 16 Different Feather" fine, which is pretty
 17 standard ASL.
 18 I also presented both of them with a
 19 classifier story by David Rivera that really,
 20 really uses complex classifier verbs in
 21 motion, location, grammar ASL. And he
 22 struggled. That's kind of -- kind of ASL
 23 that he uses. And he is on -- more on that
 24 PSE range.
 25 So he really -- he struggled with that.

1 But I would say, you know, deaf people not
 2 familiar with that art form would struggle,
 3 too. His bilingualism, I think, brings him a
 4 little more toward the English in
 5 comprehension.
 6 Q. And when you say "bilingual," which two
 7 languages are you referring to?
 8 A. ASL and English.
 9 Q. Okay. Up on top of page 81, under the CALP
 10 heading there, Roman numeral III.3.b., you
 11 say: When language becomes more academic in
 12 nature or involves explanation of new
 13 unfamiliar information or tasks, Mr. Durand
 14 also shows proficiency. Correct?
 15 A. That's correct. I mean, he's got -- he's
 16 bilingual in English and ASL. The critical
 17 thing is not that he's bilingual -- it's
 18 not -- he's a smart guy. He's got cognitive
 19 academic skills. He can understand stuff
 20 presented at a high level in ASL. He's not
 21 stupid. He just can't hear. The issue is,
 22 he's cut off from information by not being
 23 able to hear it effectively.
 24 Q. Sure.
 25 A. Okay.

1 Q. Then if you go down still on page 81, you
 2 also assessed his speech quality. You found
 3 it to be highly intelligible and easy to
 4 understand. Is that right?
 5 A. Yes.
 6 Q. And then you did that auditory monitoring
 7 alone. And that with auditor monitoring
 8 alone, his speech was: Intelligible even to
 9 someone unfamiliar with deaf speech.
 10 Is that right?
 11 A. Yes. I think you would understand him fine.
 12 Q. Is his speech, in your estimation, more
 13 understandable than that of his wife, Linda?
 14 A. Yes.
 15 Q. Okay. And then you go down to lipreading.
 16 Again, now we're on the bottom of page 81.
 17 And you conclude that he, like his wife, is
 18 an excellent lipreader; correct?
 19 A. Correct. But unlike his wife, I think he
 20 relies on that auditory -- sort of the
 21 residual auditory input for lipreading. So
 22 when you turn off the sound, he's worse than
 23 she is.
 24 Q. Is it your understanding that Roger's hearing
 25 is at a higher level or is better than that

1 of his wife, Linda?
 2 MS. GILBERT: Objection. Form.
 3 THE DEPONENT: I don't know.
 4 BY MR. FRANTZEN:
 5 Q. Is his decibel loss less severe, to your
 6 knowledge, than Linda's?
 7 A. By their reports, it should be. By their
 8 reports, she says she was severe as a child,
 9 became profound.
 10 He says he was severe as a child -- very
 11 severe as a child and not -- didn't change.
 12 But Priscilla's perception is that he has,
 13 that he's moving more into the profound
 14 range.
 15 But I would say from his
 16 self-perspective, he perceives himself as
 17 hearing more than she does. But by his
 18 performance on the soundless lipreading
 19 tests, I think he uses external sound more
 20 than she does. So he's at more of a
 21 disadvantage in -- with background noise.
 22 Q. Okay. If we jump ahead to page 97 of your
 23 report, Doctor, you note that, again, under
 24 ideal conditions, his ability -- or: His
 25 ability to lipread in ideal conditions is

1 interpreter under all those circumstances you
2 outlined?

3 A. No, I didn't say that. I said he could
4 lipread effectively.

5 MS. GILBERT: Objection. Form.

6 THE DEPONENT: I said he could lipread
7 effectively. I didn't say he could
8 understand. A person who can hear --

9 BY MR. FRANTZEN:

10 Q. What does "communication access" mean to you?

11 A. A person who can hear cannot always
12 understand. So I'm just --

13 Q. He can ask questions?

14 A. He could ask questions. He could ask for
15 clarification. The doctor could probe for
16 understanding, all of those things would need
17 to still happen. The fact that he could
18 lipread does not mean he could understand.

19 Q. But what does communication access mean? I'm
20 using your words.

21 A. Communication access means he had access to
22 this. And with the proper supports and stuff
23 that could have happened, he could have
24 gotten by. Yes.

25 Q. Without an interpreter?

1 explicit. A doctor might have or might not
2 have known to unpack it.

3 Roger might have or might not have known
4 to express that he didn't understand or ask a
5 question because if he thought it -- if he
6 thought he understood what was going on,
7 like, We're going to move him out of ICU up
8 to the fourth floor. Now we're going to
9 focus on comfort care.

10 If he believed that that meant that
11 he's -- it's no longer so intense that we
12 have to be right here in ICU, he's a little
13 bit more stable. So now we're going to get
14 up there and just focus on comfort care, as
15 opposed to, We can't do anything more for him
16 and he's dying. We're going to put him
17 upstairs. He's going to die, but we're going
18 to put him on comfort care.

19 If Roger thought, which I believe he
20 did, if he thought he understood that
21 information, and Linda did as well, it would
22 not -- talking to a doctor one-on-one would
23 not have disabused him of that unless the
24 doctor probed for his understanding.

25 An interpreter would have -- should have

1 A. But don't --

2 Q. Thank you.

3 A. But don't rephrase my words into he could
4 have understood. Okay. Because --

5 Q. I'll take what you've told me --

6 A. -- just sitting there and lipreading him --
7 like if he sat here and just watched the
8 person who was doing something and lipread,
9 I'm not saying that he would have understood
10 everything. There's a dynamic that would
11 have had to happen.

12 Q. Why don't we take five minutes, go off the
13 record.

14 A. Can I add one thing? I think it's important,
15 and it did come up here. There are certain
16 things that need to be unpacked for both of
17 them. You know, one of them -- I think a
18 telling thing is that example with comfort
19 care. Lipreading it would not guarantee that
20 Roger would understand the nuance behind all
21 of that stuff. Right.

22 So that -- that kind of exposure to
23 English is a piece that he didn't have. And
24 an interpreter would have known to unpack
25 that, to take the implicit and make it

1 probed for understanding there. And would --
2 I think, would have. A good interpreter
3 would have.

4 Q. But you don't have any criticisms of the
5 interpreters provided in this case; correct?

6 A. When Anna --

7 Q. There's nothing in your report?

8 A. When Anna Witter-Merithew says that these
9 guys with an interpreter wouldn't have
10 understood implicit information, that makes
11 me question either Anna or the interpreters.
12 One or the other has to have a problem.

13 Because these guys have CALP. They have
14 the ability to take implicit from explicit.
15 But if they don't -- if they don't know what
16 they don't know, if they don't understand
17 that they've under -- misunderstood
18 something, if no one's probed for that
19 understanding, yeah, they could have gone on
20 and misunderstood.

21 But an interpreter in that situation --
22 let me put it this way: An interpreter who
23 knew the context would have unpacked that and
24 would have checked for understanding. An
25 interpreter who is only in there for a little